Supreme Court, U.S.
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No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

SHORT HILLS ASSOCIATES, f.k.a.
Prutaub Joint Venture, *Petitioner,*

v.

NEW JERSEY COALITION AGAINST WAR IN THE MIDDLE EAST, SYLVIA ACKELSBERG, and DAVID CLINE, *et al., Respondents.*

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

PETITION FOR A WRIT OF CERTIORARI

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31 pp

QUESTIONS PRESENTED

1. Does a state court order that requires a shopping center owner to furnish a valuable portion of the owner's private property to political and social action groups to espouse causes opposed by the owner constitute a forced subsidization of another's speech in violation of the First Amendment?

2. Does a state court order that grants an easement to political and social action groups to occupy a valuable portion of a privately-owned shopping center for the purpose of espousing their causes, without either using the state's power of eminent domain or paying for the easement, violate the Takings Clause of the Fifth Amendment?

LIST OF PARTIES

The other parties in the caption, listed as automatic respondents, are:

J.M.B. Realty Corporation
Cherry Hill Center, Inc.
Kravco, Inc.
Equity Properties & Development Co.
Rockaway Center Associates
Woodbridge Center, Inc.
Livingston Mall Venture
Hartz Mountain Industries, Inc.

All parties to the proceeding in the Supreme Court of New Jersey appear in the caption of the case.

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NEW JERSEY COALITION AGAINST WAR IN THE MIDDLE EAST, SYLVIA ACKELSBERG, and DAVID CLINE, *et al., Respondents.*

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

PETITION FOR A WRIT OF CERTIORARI

The petitioner, Short Hills Associates,[1] respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of New Jersey in this case.

OPINIONS BELOW

The opinion of the Supreme Court of New Jersey (4-3 decision), together with the dissenting opinion of Justice Garibaldi, is reported at 138 N.J. 326, 650 A.2d 757. (The slip opinion is reproduced at App. 1a-80a.)[2] The per curiam opinion of the Superior Court of New Jersey, Appellate Division, is reported at 266 N.J. Super. 159, 628 A.2d 1075. (Slip op., App. 83a-86a.) The opinion of the Superior Court of New Jersey, Chancery Division, Bergen County, is reported at 266 N.J. Super. 195, 628 A.2d 1094. (Slip op., App. 87a-114a.)

[1]Short Hills Associates, a New Jersey partnership, is a continuation of the partnership formerly named Prutaub Joint Venture.

[2]The grant of the petition and of the cross-petition for certification to the state supreme court is reported at 134 N.J. 564, 636 A.2d 522. (App. 81a, 82a.)

JURISDICTION

The judgment of the Supreme Court of New Jersey was entered on December 20, 1994. (App. 115a-116a.) The supreme court denied the petitioner's timely motion for reconsideration by an order dated February 23, 1995, and filed February 24, 1995. (App. 117a.)

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend. I:

"Congress shall make no law . . . abridging the freedom of speech . . . ."

U.S. Const. amend. V:

". . . nor shall private property be taken for public use, without just compensation."

U.S. Const. amend. XIV, § 1:

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

A. Proceedings Below

On November 5, 1990, the respondents (as plaintiffs), New Jersey Coalition Against War in the Middle East and individual members of the coalition (collectively, the "Coalition"), filed a complaint for injunctive relief in the Superior Court of New Jersey, Chancery Division, Bergen County, against the owner of each of 10 shopping centers, including the petitioner, seeking temporary restraints to enjoin the owners "from preventing or interfering with the plaintiffs and their associates from distributing

pamphlets/flyers at each" of the 10 shopping centers on November 10, 1990. (Compl. 15, ¶ 1.) The trial court denied the Coalition's two applications for a temporary restraining order (and its motion for a preliminary injunction) following hearings, and the appellate division and the state supreme court each twice denied leave to appeal the interlocutory rulings. (*See* Pls.' App. (App. Div.) 81-83.)

1. How the Federal Questions Were Raised

The petitioner filed a counterclaim and an amended counterclaim against the Coalition, seeking declaratory and injunctive relief on Federal grounds. In particular, the pleadings claimed that the Coalition's political activities on the petitioner's private property, if commanded by the courts of the state, would abridge the petitioner's freedoms of speech and belief and of association under the First and Fourteenth Amendments to the Constitution of the United States and would deprive the petitioner of its property without due process of law and without just compensation guaranteed by the Fifth and Fourteenth Amendments to the Constitution. (App. 121a-127a, 133a-139a.)

2. How the Federal Questions Were Passed Upon and the Judgments Below

After an 11-day trial, the court entered judgment against the Coalition on its complaint and against the petitioner on its counterclaim. *New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp.*, 266 N.J. Super. 195, 204, 628 A.2d 1094, 1099 (Ch. Div. 1991). (App. 96a-97a.) An Order for Judgment followed on August 14, 1991. (App. 115a-116a.) The trial court found that the malls are retail establishments "designed to help customers focus upon the stores and the products contained in each of them," "[t]hey are designed and managed to induce impulse shopping," and the tenants pay for the maintenance of the common areas but are restricted from using these areas "except in the event of a mall sponsored promotion or event." *New Jersey Coalition*, 266 N.J. Super. at 200, 202, 628 A.2d at 1097, 1098. Addressing the relationship of the Coalition's

proposed use for political leafleting to the owners' actual use of their property, the court found:

> There has been no testimony or proofs offered that any of the defendant malls permit free and unfettered access and/or activities to their mall premises whether it be in the interior common areas, on the sidewalks surrounding the mall buildings or in the parking lots which are adjacent to the mall premises. The credible testimony offered by the defendants indicates that activities which are perceived by mall management to be controversial in nature or confrontational are not permitted. Effectively, every effort is made to avoid two-sided issues. Specifically outside activities of either a religious or a political nature are avoided. . . .
>
> . . . As a result of judgments made by the owners and operators of each of the malls and policies which they have established, each has embarked upon a program as to how to best manage their property and conduct their business. The plaintiffs have not met their burden of proving that their activities are not discordant with both the public and private uses to which these shopping malls are dedicated.

Id. at 203-04, 628 A.2d at 1099.[3]

The appellate division affirmed the trial court's Order for Judgment. *New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp.*, 266 N.J. Super. 159, 628 A.2d 1075 (App. Div. 1993) (per curiam). (App. 83a-86a.) The Supreme Court of New Jersey, in turn, by a four to three majority, reversed, declaring that the Coalition has a state constitutional right to leaflet at all regional shopping centers in New Jersey, including the petitioner's, and that that right is not inconsistent with Federal constitutional guarantees. *New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp.*, 138 N.J. 326, 650 A.2d 757 (1994) (4-3 decision). (App. 1a-80a.) On December 30, 1994, the petitioner filed in the supreme court a motion for reconsideration. By an order filed on February 24,

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[3]The opinion did not discuss the petitioner's counterclaim.

1995, the supreme court denied the motion for reconsideration. (App. 117a.)

B. The Respondents

The Coalition is a loose affiliation of activist groups that have engaged in an extensive array of partisan activity.[4] It is comprised of several dozen organizations with over 25,000 members, and it engages in political activities, including "holding public meetings and similar activities directed to generating discussion and activity." (App. 141a, ¶ 1.) The Coalition's actions in this case stem from its efforts to "educat[e] the public about the growing costs of hostilities in the Persian Gulf" (Compl. 2, ¶ 1), but not through traditional, grass-roots door-to-door leafleting. Instead, by this lawsuit, it seeks to concentrate its efforts on leafleting, engaging passersby, and soliciting contributions at privately-owned shopping malls, including The Mall at Short Hills, without the property owners' consent.

In addition to organizations specifically formed in opposition to the war in the Persian Gulf, the Coalition includes various other groups, such as the Baptist Peace Fellowship, the Monmouth County Coalition for the Homeless, and the New Jersey Council of Churches. (App. 142a, ¶ 6.) These various groups within the Coalition have conducted public hearings in Jersey City, teach-ins and public forums at churches and universities, gatherings at congressional offices, a rally at McGuire Air Force Base, vigils at local hospitals, and two all-day marches in Washington, D.C., as well as other activities described in the various press releases admitted into evidence. (Prutaub, JMB's App. (App. Div.) 32-49.) Indeed, even though the Coalition was denied access to the defendant-shopping malls, it boasts that it handed out over 85,000 leaflets elsewhere during the two weeks preceding the November 28, 1990, hearing on its application for temporary restraints. (App. 142a, ¶ 8.)

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[4]One month *after* this suit was commenced, the Coalition filed articles of incorporation. (*See* Tr. (6/3/91) 62.) The Coalition carries no liability insurance of any kind. (Tr. (6/3/91) 65.)

C. The Mall at Short Hills

The petitioner owns The Mall at Short Hills, a high-fashion shopping center located in the suburban community of Short Hills, New Jersey.[5] The mall caters to an affluent clientele with some 120 specialty stores and boutiques, such as Gucci and Barney's New York, leased to individual tenants, as well as Saks Fifth Avenue and two other department stores. (*See* Tr. (6/24/91) 11.) The common areas of passage between the stores were constructed and are maintained to provide a neutral, non-competitive, nondisruptive ambience that draws the customers' attention into the various stores. The tenants pay for the security, insurance, cleaning, electricity, heating, air conditioning, and upkeep of these common areas. (App. 143a, ¶ 13.)

Each of the tenants has a lease requiring the payment of a percentage of its sales to the owner (Tr. (6/17/91) 19-20), and, not surprisingly, the primary purpose of The Mall at Short Hills is to maximize the sales of its tenants. (Tr. (6/7/91) 70, 79.) The owner's goal is that the patrons freely flow through the common areas and into the stores. As one of the architectural planners of the mall testified, virtually every design element from floor to ceiling is intended to subordinate the common areas and to enhance the storefronts and the merchandise within, even the color scheme, which is monochromatic:

> It's subdued, very calm, very serene atmosphere which is very important in getting the customer to concentrate on the experience and merchandise displayed in the stores so that the mall itself does not become a distraction by virtue of its business with the colors and textures and things happening inconsistent with our primary purpose.

(Tr. (6/7/91) 85-86.)

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[5]The Mall at Short Hills is private property. No public property was dedicated for private use in the development of the mall. (Tr. (6/17/91) 35-36.) The mall receives no tax subsidies or abatements. (Tr. (6/17/91) 36.) There are no residential structures at The Mall at Short Hills, no professional offices, such as those of doctors, lawyers, or accountants, no post offices, no places of religious worship, and no public buildings. (Tr. (6/17/91) 37-39.)

Great expense and effort is taken to break down the demarcation between the storefronts and the common areas so that customers will be drawn into the stores instead of the common areas (where the Coalition wants to proselytize). Most important in this regard is the preservation of clear sight lines to the stores. Structural columns are located behind storefronts instead of in the mall, architecturally sophisticated railings are constructed of transparent glass, and tenants are required to construct their storefronts at specified angles and in conformity with strict appearance guidelines to attract customers. (Tr. (6/7/91) 81, 84, 87-88.)

Perhaps most indicative of the financial investment in the common areas and the value these areas give to the property is the owner's treatment of kiosks. While some malls place kiosks (small island spaces) in their common areas for tenant rental, either year round or during peak seasons, the owner of The Mall at Short Hills deliberately designed the common areas to be free from distraction and, therefore, elected to not allow kiosks, which, in the owner's business judgment, denigrate the mall's aesthetic atmosphere and obscure sight lines to the stores. (Tr. (6/17/91) 28-30.) The owner made this decision despite the fact that kiosks in the center of the mall alone could have generated up to $500,000 in annual rental. (Tr. (6/17/91) 29.)

To further the purpose of maintaining a nondisruptive environment in the common areas, none of the tenants is permitted to solicit business or to distribute leaflets or advertising matter in the common areas, and no politicking is allowed. (Tr. (6/17/91) 23, 25, Tr. (6/24/91) 7-8.) In addition, as stipulated by the Coalition, the mall uniformly, without discrimination, applies a trespass policy that prohibits "soliciting, speech making, distributing handbills or other literature, seeking signatures on petitions, or taking surveys." (App. 143a, ¶ 17, 144a, ¶ 20.) The Mall at Short Hills does not even permit the Boy Scouts or Girl Scouts, the Red Cross, or the Salvation Army to appear on its premises (*see* App. 144a, ¶ 19), and it allows no art shows, lectures, flower shows, or the like. (*See* Tr. (6/24/91) 11.)

The majority of the Supreme Court of New Jersey made findings or took judicial notice of supposed facts that do not apply to The Mall at Short Hills and, in some cases, are contrary to the express Stipulation of Facts of the petitioner and the Coalition. For example, while the majority states that "[t]he centers, moreover, have apparently not excluded the partisan political speech often found in voter registration drives, most of which were sponsored by party organizations or candidates, and especially found in the conduct of the candidates (and presumably their aides) as they walk through the mall," *New Jersey Coalition*, 138 N.J. at 360, 650 A.2d at 774, the Coalition stipulated that, in fact: "The Mall at Short Hills does not allow its common areas to be used for political functions," and it "has never allowed partisan political activities on its private property." (App. 144a, ¶¶ 18, 23.) No voter registration drive or candidate walk-through has ever been permitted at The Mall at Short Hills.

While the majority mentions a variety of public service activities that occur at various shopping centers, including providing access to community groups, permitting leafleting, and sponsoring other events that included political speech or issues of civic importance, *New Jersey Coalition*, 138 N.J. at 340-42, 650 A.2d at 764-65, *none* of these activities has ever taken place at The Mall at Short Hills. Indeed, the Coalition conceded that The Mall at Short Hills "appears not to sponsor any public service activities." (Pls.' Br. (App. Div.) 32.) In fact, the mall sponsored only three types of events in 1990 and 1991 - concert performances, Santa Claus at Christmas, and Peter Rabbit at Easter, *New Jersey Coalition,* 138 N.J. at 385-86 app. B, 650 A.2d at 787 app. B, each of which was designed to draw targeted customers into the mall. (Tr. (6/24/91) 12-14.)[6]

The petitioner's plan of operation for its mall is the result of business judgment backed by substantial investment. (Tr. (6/7/91) 69-88, Tr. (6/17/91) 3-6, 12-13, 15-18, 19, 21, 25.)

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[6] As the manager of The Mall at Short Hills testified, the music performances were scheduled to build up traffic during the time that two of the mall's anchor tenants, Bonwit Teller and B. Altman, closed, and the concert series has not been repeated since. (Tr. (6/24/91) 12-13.)

Secondary buying by shoppers, which are impulsive purchases from stores other than the initial one that brought the shopper to the mall (frequently one of the department stores), is the single most important factor in the overall success of the mall. (Tr. (6/17/91) 15-16.) The likelihood and frequency of secondary purchases is greatly enhanced by the construction and maintenance of the common areas of the mall in a comfortable, nonconfrontational, nondisruptive state. (Tr. (6/17/91) 15-16.)

The injection of political activity into this environment would have a powerful effect on shopping behavior. At the very least, it would distract shoppers during their travel through the interior common areas from store to store. Worse yet, especially with controversial groups and issues, it would divert shoppers from the tenants' retail stores. (Tr. (6/17/91) 6-8, 11, 30-31, 97-98.) Gallup market research introduced into evidence shows that from one-third to two-fifths of New Jersey mall patrons would alter their shopping behavior (i.e., go out of their way or shop less) or avoid the mall altogether to shun leafleting or solicitation by political or religious groups. (App. 154a-157a.)[7]

Significantly, in addition to opposing the Coalition's presence in the mall because its activity is inconsistent with the mall's investment-backed purpose and the mall's invitation to the public, the petitioner wishes to exclude the Coalition because it objects to the Coalition's political program. The majority of the state supreme court entirely ignored this crucial fact, stipulated by the parties: the owner of the mall disagrees with the Coalition's message. (App. 143a, ¶ 15.)

The majority ultimately justified its decision on its *judicial notice* of the "fact" that shopping centers have "displaced the downtown business districts" of New Jersey. *See New Jersey Coalition,* 138 N.J. at 346-47, 650 A.2d at 767-68. Nevertheless, the Coalition's own planning expert explicitly testified that

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[7] *See* testimony of Scott S. Ahlstrand, Senior Project Manager and Professional Analyst for The Gallup Organization, Inc., and the tabular results and the report of Selection Research, Inc. (the parent company of Gallup), admitted into evidence as Exhibits D6 and D7. (Tr. (6/6/91) 23, 51-52, 76, 87-90, 96, 100-03, 105-07, 109-11.)

shopping malls have *not* "replaced" the downtown areas. (Tr. (6/5/91) 49.) In fact, the Coalition's political expert testified that the municipalities, with their shopping areas, supermarkets, and movie theaters, provide better opportunities for leafleting than they did in the 1970's. (Tr. (6/3/91) 157.)[8] Indeed, the record shows that the towns surrounding certain of the malls, including The Mall at Short Hills, have remained vital, have new and larger businesses and business districts, and have generated an ever-increasing retail sales volume. (*See* Tr. (6/3/91) 77-78, 152-53, 155-56, Tr. (6/5/91) 54-55.)

REASONS FOR GRANTING THE PETITION

This is a case about the collectivization of private property in the supposed service of preserving free speech. The Supreme Court of New Jersey in the present case, *New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp.*, 138 N.J. 326, 371, 650 A.2d 757, 780 (1994) (4-3 decision), believes that private property owners who, "for their profit," develop successful shopping centers "must be held to have relinquished" their right to not subsidize others' speech. Accordingly, relying on *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), the state court commands the owner of The Mall at Short Hills to underwrite the speech of the Coalition and allow it to spread its message - a message with which the owner disagrees - on the owner's private property. But in the 15-year interim since *PruneYard*, a case which did not address the issue of subsidization, it has become clear that freedom of speech - the shopping center owners' as much as the protesters' - necessarily includes the freedom to not contribute to political ventures as well as to contribute to them. And even if shopping center owners can be pressed into service against their will, they must be compensated

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[8] The Coalition's political expert further testified that, even though he had conducted many successful political campaigns during his career, he never distributed leaflets at an enclosed shopping mall (Tr. (6/3/91) 144-45), and he admitted that "there are other effective ways to distribute literature." (Tr. (6/3/91) 142.) Even door-to-door leafleting, according to the expert, while not good for a "crisis situation," is "very, very effective in the long run." (Tr. (6/3/91) 116-17.)

in full for the expenses and the lost revenues associated with the taking of their property; they may not be told that they alone must bear the costs generated by others.

I. THE STATE SUPREME COURT FORCES THE OWNER OF THE MALL AT SHORT HILLS TO SUBSIDIZE THE POLITICAL SPEECH OF THE COALITION IN VIOLATION OF THE FIRST AMENDMENT

The principle of "freedom of speech" is inconsistent with the proposition that a person should be required to subsidize the speech of another. The issue in this case, then, is whether a state court, interpreting its state constitution, may balance the speech rights of one person against those of another and compel one person to subsidize another's political speech. Although the Supreme Court of New Jersey said that it relied on this Court's ruling in *PruneYard* to justify just such an imposition, *PruneYard* did not address the issue of whether the state may compel one private citizen to subsidize the political activities of another private citizen.[9] Such a compulsion, this Court has repeatedly said, is flatly prohibited by the First Amendment. *Lehnert v. Ferris Faculty Ass'n,* 500 U.S. 507 (1991).

The forms that subsidies can take are protean. One may camouflage the subsidy by exacting it in kind instead of in cash. Just that is done in the present case when the Coalition demands the right to use, for its own selfish purposes, the owner's property free of charge. It surely would be constitutionally indefensible for

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[9] This issue was not briefed by the parties in *PruneYard* presumably because of the limited record that came to this Court (the trial court had granted summary judgment), and only Justices White and Powell, concurring in part and in the judgment, expressed concern about the issue. Justice Powell commented that, "[e]ven if a person's own speech is not affected by a right of access to his property, a requirement that he lend support to the expression of a third party's views may burden impermissibly the freedoms of association and belief protected by the First and Fourteenth Amendments." *PruneYard*, 447 U.S. at 98 n.2 (Powell, J., concurring). As he explained, this may amount to "an unacceptable 'compelled subsidization.' " *Id.* (quoting *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 237 (1977)).

the state to extract from the owner a cash contribution to the Coalition. It is no better if the state simply forces the owner, without any choice at all, to provide the Coalition with a forum, a soapbox.

Unlike in the *PruneYard* case (with just seven findings of fact made by the trial court on summary judgment), the record in this case was developed during 11 days of trial testimony and by stipulations of fact showing that the relief sought by the Coalition amounts to a forced subsidization of its political cause. The record shows that the petitioner's wholly-enclosed shopping center[10] was carefully designed and built at great additional expense to create an elegant environment - neutral and apolitical in all respects.[11]

It is precisely this private space that the Coalition wants to appropriate as a forum for its causes: not because its activity is in any way " 'related in its purpose to the use to which the shopping center property [is] being put,' " *Lloyd Corp. v. Tanner*, 407 U.S. 551, 563 (1972) (quoting *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 320 n.9 (1968)), and not because it has no "adequate alternative avenues of communication." *Id.* at 567.[12] Rather, the Coalition wants this particular private space as its forum precisely because the petitioner's expense and effort have made it attractive, comfortable, safe, heated in the winter, and air-conditioned in the summer. (And that environment - so carefully planned - is the reason why the tenants pay an industry-high rental.)

The mall's tenants alone pay for the maintenance and upkeep of the mall, including the costs of security, insurance,

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[10] The PruneYard Shopping Center is an open-air shopping center.

[11] While some mall owners, exercising *their* business judgment, do turn a part of their property into a forum by granting access to political, charitable, and not-for-profit groups, the petitioner allows no such activities to interfere with its investment in creating a retail environment free from distraction and with its decision to not lend a forum in support of any third party's political, religious, social, or philanthropic views.

[12] After all, the Coalition managed to hand out over 85,000 leaflets in places *other* than shopping centers during the two weeks preceding its application for temporary restraints. (App. 142a, ¶8.)

cleaning, electricity, heating, air conditioning, and upkeep. Yet the tenants themselves are expressly prohibited from distributing handbills or advertising material in the common areas. The Coalition certainly could not insist that the tenants make a contribution to its political campaign; it is hardly better for the state to impose that obligation on the tenants - in effect, an additional common area maintenance charge.

The magnitude of the imposition on the petitioner and the tenants is borne out by the expert testimony of Scott S. Ahlstrand, professional analyst for The Gallup Organization. His research reflects that, of those adult New Jersey residents who go to shopping malls at least once a month:

- Thirty-three percent would either go out of their way, or try to avoid a group if not inconvenient, if they were confronted with a group soliciting contributions or distributing information in a shopping mall.
- Forty-one percent agree or strongly agree that they would shop less at those malls where political or religious action groups were present.
- Forty-one percent agree or strongly agree that they would look for other places to shop if political or religious action groups were at the malls where they shopped.
- Twenty-three percent would shop less at those malls where anti-war action groups were distributing information and speaking.

(App. 154a-157a.)[13]

The enormity of the imposition is made yet more evident by a critical fact in this case: "The owners of The Mall at Short Hills disagree with the plaintiffs' political message." (App. 143a, ¶15.) This undisputed fact, missing in *PruneYard*, shows that, although the petitioner opposes the political program of the Coalition, the

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[13] This research does not even address the powerful effect that extreme groups would have on the shopping behavior of parents who bring their children to the mall's safe and controlled environment for back-to-school or holiday shopping.

petitioner has been forced by the Supreme Court of New Jersey to subsidize it nonetheless. It hardly matters that the customers of the mall may (imperfectly) realize that the statements made by the Coalition do not represent the views of the petitioner. *See PruneYard*, 447 U.S. at 87 (the activists' views "will not likely be identified with those of the owner.").[14] Certainly, the members of the Coalition may not stick their hands into the pockets of the petitioner for cash with a promise that the money will not be spent for purposes that the petitioner opposes.

Chief Justice Wilentz meets this point with the shocking conclusion that the petitioner has *relinquished* its right of free speech:

> [P]rivate property owners who have so transformed the life of society for their profit (and in the process, so diminished its free speech) must be held to have relinquished a part of *their* right of free speech. They have relinquished that part which they would now use to defeat the real and substantial need of society for free speech at their centers; they should not be permitted to claim a theoretically-important right of silence from the multitudes they have invited.

New Jersey Coalition, 138 N.J. at 371, 650 A.2d at 780.[15]

The insights of James Madison and Thomas Jefferson, as relevant today as when they were penned, serve as an articulate response to the Chief Justice's cavalier dismissal of the petitioner's constitutional right as a punishment for its economic foresight and success:

> "James Madison, the First Amendment's author, wrote in defense of religious liberty: 'Who does not see . . . [t]hat the

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[14]In fact, there is no reason to suppose that listeners will *not* mistake the sponsorship of the objectionable views. The Coalition itself mistakenly asserted that Riverside Square Shopping Center sponsored the display of yellow ribbons in one or two tenant-stores during the Iraq war. (Pl.'s Br.(App. Div.) 11 & n.22.)

[15]Where next? If the home-shopping networks "supplant" shopping centers, will the network owners be required to carry political messages free of charge?

> same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?' 2 The Writings of James Madison 186 (G. Hunt ed. 1901). Thomas Jefferson agreed that 'to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical.' I. Brant, James Madison: The Nationalist 354 (1948)."

Chicago Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292, 305 n. 15 (1986) (quoting *Abood v. Detroit Bd. of Educ.,* 431 U.S. 209, 234-35 n.31 (1977)).

In this Court's decision in *PruneYard*, the full case for the owner's freedom of speech was not explored, and the Court was content to say that, so long as the public at large did not identify the owner with the message that was delivered, no First Amendment claim could be raised. *PruneYard*, 447 U.S. at 87.[16] But subsequent decisions of this Court have made it clear that the guarantee of freedom of speech embraces more than the ability to disclaim sponsorship of a political message. The right carries with it the right not to speak, the right to decline to foster particular political causes, the right "to exclude individuals with ideologies or philosophies different from those of [the owner]." *Roberts v. United States Jaycees*, 468 U.S. 609, 627 (1984). Dissociation in

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[16] Nonetheless, Justice Powell, concurring in part in *PruneYard*, saw a potential problem in the forced association of an owner with "speakers who wish to use his premises as a platform for views that he finds morally repugnant," listing as examples, "[a] minority-owned business confronted with distributors from the American Nazi Party or the Ku Klux Klan, a church-operated enterprise asked to host demonstrations in favor of abortion, or a union compelled to supply a forum to right-to-work advocates." *PruneYard*, 100 U.S. at 99 (Powell, J., concurring). The infringement of First Amendment rights in *PruneYard* was only potential because, in that case, there was no allegation that the property owner "disagree[d] with the messages at issue." *Id.* at 98 n.2. *See also Pacific Gas & Elect. Co. v. Public Utils. Comm'n of Cal.*, 475 U.S. 1, 12 (1986) ("[T]he owner did not even allege that he objected to the content of the pamphlets . . . ."). Justice Powell's concern is brought to the forefront in the present case because it is stipulated that the owner here *does* disagree with the Coalition's political message. (App. 143a, ¶15.)

the eyes of the public at large is not sufficient to protect the interests in freedom of speech held by the persons whose wealth has been commandeered into a cause with which they do not agree. Rather, they have the right to resist the forced subsidy altogether. As the Court had said in *Wooley v. Maynard*, 430 U.S. 705, 714 (1977): "A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts." And the person who cannot be required to bear the expression "Live Free or Die" on his license plate surely cannot be required to turn over his property, even in part, to political groups with which he stands in opposition.

This principle is clearly enunciated in the recent decision in *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991). In that case, the question was the purposes to which a union could use the dues collected from its nonmembers. The basic structure of collective bargaining operates on the assumption that the union bargains for all workers in the unit, so, in order to protect against "free riding," the union may charge all workers, even nonmembers, for collective bargaining activities. In *Lehnert*, however, the forced contribution was spent not for collective bargaining, but for matters of general political or social concern. The issue at that point was whether a person may be compelled to support views that he opposes, even if supported by the majority of the union members. The Court said no: "[T]he State constitutionally may not compel its employees to subsidize legislative lobbying or other political union activities outside the limited context of contract ratification or implementation." *Id.* at 522. *See also Ellis v. Brotherhood of Ry., Airline & Steamship Clerks*, 466 U.S. 435, 447 (1984) ("Employees could be required to become 'members' of the union, but those who objected could not be burdened with any part of the union's expenditures in support of political or ideological causes.") If bargaining unit workers are allowed to resist subsidizing the causes sponsored by their union leadership, whom they elect, then it is all the more necessary that property owners and their tenants be allowed to resist the speech demands of uninvited groups over which they have no electoral influence.

This rejection of a compelled subsidy is not confined to the labor union cases. In *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1 (1986), the Court vacated a state regulatory order that forced a public utility to carry clearly marked messages of its political opponents in its billing envelopes even though the utility did not incur any additional out-of-pocket costs to comply with the regulation. The Court rejected the speech subsidy, which, as in the present case, was not in cash, but in kind. Then-Justice Rehnquist dissented in the *Pacific Gas & Electric* case based on his "belie[f] that the right of access [in *Pacific Gas & Electric* was] constitutionally indistinguishable from the right of access approved in *PruneYard*." *Id.* at 26 (Rehnquist, J., dissenting). And so it is. If the First Amendment forbids forcing individuals to promote the message of others when there is no direct cost to them, then, a fortiori, the First Amendment must also forbid forcing persons to subsidize the speech of others when it comes at a clear economic cost.

The state supreme court assumes that reasonable regulations imposed by the property owner will negate the subsidy. This assumption, however, naively ignores the court's corollary assertion that, in regulating political speech, the malls may only impose restrictions concerning the time, place, and manner of the speech without consideration of the content of the message. While such a limitation is consistent with the obligation imposed on a governmental actor, *see Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647-48 (1981), the petitioner is not a governmental actor.

There is a categorical distinction between the obligation of the state in its use and management of its public property and the obligation of a shopping center owner in the use and management of its private facilities. The prohibition against viewpoint discrimination applies only to avoid governmental endorsement. In the private setting, the First Amendment allows a private citizen to support one candidate without incurring the obligation to allow equal access to the candidate's rival, just as the owner may make a campaign contribution to that candidate without being obliged to support his or her opponent. In light of the

owner's right to select and promote those viewpoints with which it agrees, it should be clear that the ability (and the obligation) to impose content-neutral regulations does not protect the petitioner's First Amendment rights.

Treating the petitioner as a governmental actor exacts other costs, as well. When the state is involved, the mere threat of violence is not enough to deny free speech rights, for the state has the ability and the obligation, despite the financial burden, to protect the unpopular speaker from violence. *See, e.g., Collin v. Smith*, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978) (invalidating Skokie, Illinois, ordinances that had placed restrictions on the Nazis' planned controversial march with swastikas in a Jewish neighborhood). Will the same rule apply to a shopping center, which does not have a municipally-paid and trained police force? Will the petitioner have to permit, along with the pro and anti-war, abortion, and tax factions, to name a few, members of the American Nazi Party and the Ku Klux Klan to appear in "uniform?" Will opposing groups also have a right to be present at the same time to attempt to counter each other's effort with the "relevant audience?"

The often-cited experience reported in *Cologne v. Westfarms Associates*, 192 Conn. 48, 469 A.2d 1201 (1984), is illustrative of the problems that arise when private citizens are forced to create and regulate a forum for political speech. In that case, the Ku Klux Klan sought to take advantage of a prior decision of the superior court that had granted the National Organization for Women access for expressive purposes to the Westfarms Mall located in West Hartford, Connecticut. Anti-Klan groups arrived at the mall to protest and demonstrate against the *mall's* granting access to the Klan, resulting in injury to persons, considerable financial damage and disruption to businesses, and a major disturbance that was not quelled until the West Hartford and New Britain SWAT teams, in full riot gear together with police dogs, arrived on the scene and sealed off several of the mall's entrances. Not surprisingly, the demonstration had a devastating effect on the mall's tenants, as sales declined by 35 percent.

(Prutaub, JMB's App. (App. Div.) 161-67.) As the superior court later explained in modifying its prior injunctive order:

> Several persons were injured, there was considerable financial loss and disruption to business tenants of the defendants, not only during the demonstration but during the entire day as demonstrated by comparative income figures offered through witnesses for the defendants. Additionally, customers of G. Fox & Co. were treated to the spectacle of police in full riot gear together with at least one police dog removing one of the demonstrators across the sales floor. The main entrance doors to the G. Fox sales premises were locked during the period of the confrontation which was in excess of an hour thus eliminating a major exit route to persons inside the premises should the need arise. Police witnesses expressed the opinion that had this confrontation occurred inside the mall the results would be uncontrollable and disastrous in terms of potential physical injury to police, customers and tenants and their employees as well as damage to property.

Cologne v. Westfarms Assocs., No. 274171, slip op. (Conn. Super. Ct. Aug. 13, 1983) at 3-4, *modifying* No. 274171, slip op. (Conn. Super. Ct. Feb. 28, 1983), *rev'd,* 192 Conn. 48, 469 A.2d 1201 (1984). The Supreme Court of Connecticut subsequently reversed the original judgment that had granted entry to NOW. *Cologne,* 192 Conn. 48, 469 A.2d 1201.

When dealing with a private person and not a governmental entity, time, place, and manner regulations do not offer a solution to compelled subsidization. The assertion that regulations will resolve the problem deliberately ignores the very facts which make the described incident pertinent. In the *Cologne* case, the disturbance was not caused by the group seeking access (the Ku Klux Klan), it was caused by political demonstrators who opposed the presence of the Ku Klux Klan and believed they had a "constitutional right" to demonstrate their opposition at the same place and time and to the same audience as the Ku Klux Klan. In other words, no amount of regulation could have forestalled the problem caused by the injection of this politically inflammatory

issue into the otherwise neutral environment of the mall. Rather, it took SWAT teams from two counties to restore order.

The mall owner and its tenants, not the government, pay for the resulting costs, not only from the stores being overrun and closed, but from the undeniably negative publicity that forces the mall's association with the group, and with the event itself. Under the Constitution, the government, not select private citizens, should bear these subsidization costs.

In the end, it all comes down to the same principle: a state may not require a person "to contribute to the support of an ideological cause he may oppose." *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235 (1977). Yet, if access is mandated by the state court, the petitioner and the tenants, who pay for the mall areas so attractive to the Coalition (and who are themselves not permitted to solicit patronage there), will be forced to subsidize the Coalition's political activities. And forcing the petitioner to supply a forum - indeed, a safe, secure, insured, heated, and air-conditioned forum - for causes it finds objectionable is a forced subsidization in violation of the First Amendment.

II. THE STATE SUPREME COURT TAKES THE PRIVATE PROPERTY OF THE MALL AT SHORT HILLS FOR THE USE OF THE COALITION WITHOUT JUST COMPENSATION IN VIOLATION OF THE FIFTH AMENDMENT

The Supreme Court of New Jersey "believe[s]" that the state right of freedom of speech "is fundamentally more important than" private property rights, *New Jersey Coalition*, 138 N.J. at 371, 650 A.2d at 780, and, therefore, the court ignores any "*negative* effect on [the mall owners'] enterprises" as "an unavoidable consequence of their own activities." *Id.* at 372, 650 A.2d at 780. The Takings Clause, U.S. Const. amend. V, along with the Supremacy Clause, U.S. Const. art. VI, cl. 2, however, does not allow such a preemptory dismissal of property rights. Nor does *PruneYard* grant a license to lump every "regional shopping center" into a single basket, subject to the

state court's command, without any consideration of the value and use of the particular property.

It is true that not every governmental injury to property is an unconstitutional "taking." Rather, that determination requires an inquiry into "the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations." *PruneYard*, 447 U.S. at 83 (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979)). Unlike in *PruneYard*, the evidence in this case "demonstrate[s] that the 'right to exclude' " political activity "is so essential to the use or economic value of [the shopping center] that the state-authorized limitation of it amount[s] to a 'taking.' " *Id.* at 84. One cannot visit The Mall at Short Hills and not come away with the inexorable conclusion that nowhere in this mall may a political action group engage in canvassing activities without interfering with the unique architectural design and the purposeful environment created there.

That which may be of little moment to the unpracticed eye of an outsider is critical to preserving the elegant atmosphere of an upscale fashion center such as The Mall at Short Hills. The owner's goal is to encourage the circulation of shoppers *through* the common areas and *into* the stores; the systematic effort is to create an environment in which the common areas are subdued so that the customers have a direct and unimpeded visual engagement with as many separate storefronts as possible.

Every detail in the planning, design, and construction of the mall was a carefully considered economic decision backed by private investment. Design, tenant mix, and demographics are all combined to make The Mall at Short Hills a magnet for high-end retailers and their customers. Everything is conceived and organized in minute detail to be part of an harmonious whole: what type of tenant will be placed in which location (e.g., Gucci in the center court area), the design and composition of the flooring (cushioned marble), the use of lighting (skylights and spotlights), the types and locations of accessways between levels, the form and function of the architecture (e.g., no structural columns, glass railings), the selection and placement of internal landmarks.

Architectural presentation such as columns and colors, which may appear to be of little importance to the untrained observer, is critical for setting the mood that induces commercial activity. Every stage in the development is done with the view of the maximization of sales and the return on the owner's investment.

In *Dolan v. City of Tigard*, 114 S.Ct. 2309 (1994), Chief Justice Rehnquist distinguished *PruneYard* on the basis that "the shopping center 'may restrict expressive activity by adopting time, place, and manner regulations that will minimize any interference with its commercial functions.' " *Id.* at 2321 (quoting *PruneYard*, 447 U.S. at 83). But the "right" to regulate the time, place, and manner of political leafleters, as if the owner were a governmental entity regulating a public forum, is illusory. As a private property owner, the petitioner previously had the absolute right to exclude those who exceeded the scope of its invitation to shop. Would the taking in *Dolan* have been any less a taking had the city allowed Mrs. Dolan to limit the use of the proposed pathway to one day each weekend, between the hours of 1:00 and 5:00 o'clock in the afternoon?[17] The only true distinction between *Dolan* and *New Jersey Coalition* is that the City of Tigard sought to control an undeveloped and previously-unused piece of land at the back of the owner's property line, while in the present case, the New Jersey court imposes state control over the core (and most valuable) portion of the petitioner's property.

It must also be recognized that the time, place, and manner of political canvassing is actually set by the state supreme court, not by the petitioner. The *manner* is specifically dictated by the court - leafleting, voice contact with passersby, and a sign, *New Jersey Coalition,* 138 N.J. at 378, 650 A.2d at 783 - and the *time* and *place* of exercising free speech are controlled by what is "necessary to convey the message," *id.* at 378, 650 A.2d at 783,

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[17]In addition, put to the choice between the surrender of an inessential portion of her land and the required toleration of leafleters inside her plumbing store, albeit subject to her "reasonable" time, place, and manner regulations, is there really any question that Mrs. Dolan would have preferred the former to the latter: why then should the Fifth Amendment protect only the interest that she values less?

rather than by what will protect the petitioner and the tenants. By definition, the petitioner cannot adopt regulations to protect itself and the tenants from the most prevalent harm - the interception of passersby in the corridors while they travel from store to store and the diversion of their attention.[18] The shoppers' undivided time and focus are the very essence of the petitioner's substantial investment-backed expectation. The economic impact of this intrusion is reflected in the Gallup research introduced by the petitioner: 33 percent of the patrons would avoid the group, as well as the stores in the area of the group, and 41 percent would shop less at a mall with such activity.

The "right" to regulate actually imposes on the petitioner a quasi-governmental duty, with none of the governmental protections that would be present if the state actually took over the property. For example, on public property, the state has the obligation to provide police protection for the unwanted speaker and the audience. Now the petitioner must bear the cost of providing security. And what about the increased risk of injury, to speaker or shopper, either by accident or by instigation? On state-owned property, there is governmental immunity; on private property, the petitioner must buy liability insurance.[19] These are " 'public burdens which, in all fairness and justice, should be borne by the public as a whole,' " not by the petitioner and the

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[18]Implicit in the New Jersey court's rationale is the argument that, so long as an invitation has been extended to so many, the costs to the mall of admitting still other persons are too small to bother with. But that argument has it precisely backwards. It is exactly because so many people are present at the mall that the owner is so insistent on controlling the activities in the mall and guarding the right to exclude politicking. When unwelcome groups enter the mall, the evidence is that they will reduce the number of visitors to the mall, shorten the visitors' length of stay, and substantially cut their level of purchases, as the Gallup survey so clearly shows. The *more* people who are present at the mall, the *more* critical it is to curtail inconsistent activities in the mall, and the *more* important to restrict access.

[19]Although the Supreme Court of New Jersey acknowledges the concern "not just for business, but for the safety and security of people at the premises," it dismisses these concerns as hardly "novel," having been dealt with successfully by this country, its cities, and its downtown business districts. *New Jersey Coalition*, 138 N.J. at 376, 650 A.2d at 782. What the court ignores, however, is that those places are public property, and the cost of safety, security, and losses is borne by all of the people, not a select few.

tenants. *PruneYard*, 447 U.S. at 83 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

Likewise, it is of no consequence that the intrusions may be intermittent instead of constant.[20] The New Jersey court has dedicated a *permanent* easement through The Mall at Short Hills. While a particular leafleter will not occupy The Mall at Short Hills continuously, just as no member of the public in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), was going to occupy the beachfront continuously, under the New Jersey court decision, "individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises." *Nollan*, 483 U.S. at 832. Squatting and repeated entry are both deliberate trespasses, notwithstanding the differences in location, frequency, and duration. It makes no sense as a matter of constitutional law to erect a categorical distinction between different kinds of trespasses, in a manner that is wholly inconsistent with the traditional understandings of the common law. *See Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886 (1992). The " 'right to exclude,' so universally held to be a fundamental element of the property right," plainly includes protection from government-imposed easements. *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979).

Stitched together, a ready procession of discrete, temporary occupations is little different, and more costly, than the permanent physical occupation proscribed in both *Nollan* and *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). In fact, an easement in the common areas of The Mall at Short Hills imposes far greater costs on the owner than a pathway at the rear of its lot or the outright confiscation of a small area on the mall's roof for the placement of an antenna (as in *Loretto*). Indeed, the devaluation of the areas of the petitioner's private property by the

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[20]Both *Nollan v. California Coastal Commission*, 483 U.S. 825, 832 n.1 (1987), and *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434 (1982), distinguished *PruneYard* on the basis that the *PruneYard* invasion was temporary, while *Nollan* and *Loretto* each involved a permanent occupation.

New Jersey court is revealed by the rental that the petitioner has already eschewed from disparate uses. For example, the petitioner does not accept sums up to $500,000 per year for the erection of individual kiosks in the center of the mall because the decline in aesthetic appearance and the obstruction of visual sight lines will cost that amount and more in sales that could be derived from the leased stores.

In sum, the Supreme Court of New Jersey may believe that the collectivization of private property to preserve free speech is a good idea, but that does not mean that the owner of The Mall at Short Hills alone can be compelled to contribute to this realization. Rather, New Jersey is free to advance its wish of turning a portion of the common areas of the mall into city streets for the use of political and societal speakers by using its power of eminent domain for this "public purpose." But, as the Court said in *Nollan*, 483 U.S. at 842, "if [the state] wants an easement across the [mall] property, it must pay for it."

CONCLUSION

The petition for a writ of certiorari should be granted.

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